On the other hand, the author notes conflicting instances where "narrow tailoring" has been treated as little more than rational basis review by this Court and lower courts. *Id.* at n.54 (collecting references). *See also*, Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1249-50, 1260-70 (1995) (stating that "contemporary First Amendment doctrine is ...striking chiefly for its superficiality, its internal incoherence, [and] its distressing failure to facilitate constructive judicial engagement," and highlighting the Court's treatment of the narrow tailoring portion of the time, place, and manner test as exemplary of these problems); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 641-44 (1991) (discussing the various approaches to the narrow tailoring test adopted by courts and the controversy that has resulted); Matthew D. Bunker, Emily Erickson, *The Jurisprudence Of Precision: Contrast Space And Narrow Tailoring In First Amendment Doctrine, Communication Law and Policy*, Spring, 2001 page 259 ("The United States Supreme Court often requires that laws regulating free speech be narrowly tailored. The narrow tailoring requirement lacks analytical rigor in the Court's opinions, however.")

Even *Ward*, the case most frequently cited as the guidepost on narrow tailoring contains contradictory and confusing guidance. *See*, 114 Harv. L. Rev. at 295, & n.56. In *Ward*, the Court stated both that narrow tailoring is satisfied if a "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," *Ward*, 491 U.S. at 799, and that the "essence of narrow tailoring" is that a regulation must "eliminate [the evils that it purports to address] without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7. The *Ward* court also stated, "Government may not

regulate expression in such a manner that a *substantial* portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799, (emphasis added).

Similarly, in *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), this Court stated "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Each of these statements falls on a continuum of analysis indicating that a narrowly tailored regulation is one that, on one end of the spectrum, promotes a substantial government interest that would be achieved less effectively absent the regulation, while on the other end of the spectrum the regulation targets and eliminates no more than the exact evil it seeks to eliminate.

As the above discussion shows, the commentators recognize the "narrow tailoring" test is in need of further refinement by this Court. The confusion in this area led the Sixth Circuit to erroneously rule that the Fairfield, Ohio ordinance was not narrowly tailored. The more than 30,000 local governments in the United States would benefit greatly if this Court would accept certiorari in this case to provide additional guidance on how to structure an ordinance that is narrowly tailored and on how courts should engage in a proper analysis under this test. For this reason, the International Municipal Lawyers Association respectfully requests that this Court grant the City's petition for certiorari.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

As noted above, the "narrow tailoring" prong for analyzing the constitutionality of content neutral time, place, and manner regulations is in need of further refinement. An additional factor in favor of granting certiorari in this case is

the fact that the Sixth Circuit misapplied this Court's teachings.

The International Municipal Lawyers Association agrees with and adopts the City of Fairfield's position and arguments with respect to the proper application of the narrowly tailored analysis. *See*, Pet. at 15-27. Additionally, IMLA notes that the Sixth Circuit, in conflict with this Court's guidance, erred when it substituted its judgment of the need for application of the ordinance in this case for the judgment of the City.

> *In our view*, the asserted government interests of keeping the public right-of-way clear and preserving aesthetics of the community, while generally considered substantially, are simply not achieved any less effectively absent the application of the ordinance in this case.

Pet. App. at 10a. Emphasis added.

This Court has counseled against substituting judicial views for those of the legislators charged with making decisions for communities. Although courts must independently evaluate legislative findings in performing their constitutional review, this evaluation "is not a license . . . to replace the [legislature's] factual predictions with [the court's] own." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994). In this instance, the City determined that allowing structures in the right of way, now matter how temporary, interfered with the smooth and safe flow of traffic, and interfered with the aesthetic standards the City wished to enforce for its citizens. The Sixth Circuit, however, substituting its judgment, determined that a structure which was present for only a few hours at a time would not

adversely affect either of these interests. That conclusion was not proper for the Sixth Circuit to make.

The Sixth Circuit also faulted the City for a perceived lack of evidence that any adverse effect had actually occurred due to the temporary presence of the balloon.

> There is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right of way has any adverse effect, such as obstruction of pedestrian or automobile traffic.

Pet. App. at 10a. However, this was an improper basis for the court's ruling. The City need not wait for the balloon to cause a traffic obstruction before it can prohibit its presence in the right of way. The City need not wait for one or more of the 40,000 automobile trips along Dixie Highway to result in an accident caused by driver distraction induced by a giant rat balloon before it can prohibit structures, whether permanent or temporary, in the right of way. "[S]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc,* 512 U.S. at 665 (1994). The City could legitimately determine that structures in the right of way could adversely affect the safety of drivers and automobiles on Dixie Highway. In fact, temporary structures could well cause more concern for the City and drivers because of their limited duration, making these structures especially noticeable and distracting as a result of being out of the ordinary for a commute along Dixie Highway. The Sixth Circuit was incorrect when it ruled that a lack of objective evidence of obstruction and harm was required to sustain the ordinance in this case.

Lastly, the Sixth Circuit's ruling opens local governments to claims that ordinances are enacted arbitrarily – for how can a local government decide at what point a temporary structure, like a 12 foot high rat balloon, becomes a threat to safety and aesthetics – at 3 hours, 4 hours, 8 hours, 3 days? Perhaps this decision will be governed by the particular facts surrounding each structure, in which case local governments face having their ordinances invalidated because the officials charged with enforcing them have unfettered discretion to decide which structures are allowed and which are not. This result cannot be correct under this Court's teachings.

CONCLUSION

For these reasons, the *amici* respectfully urge this Court to grant the City of Fairfield's petition for certiorari.

Respectfully submitted,

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